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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 566

IRVING JOSEPH LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 23-34; R. IV, 1-13) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1966 (Pet. App. 35; R. IV, 14). A petition for rehearing was denied on August 24, 1966 (Pet. App. 36; R. IV, 15-20). The petition for a

writ of certiorari was filed on September 19, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was probable cause for the arrest of petitioner without a warrant, and whether the incidental search of his person was thus proper.

2. Whether the court's charge relating to possession of recently stolen property improperly shifted the burden of proof.

STATEMENT

In the United States District Court for the Eastern District of Missouri petitioner was found guilty by a jury on a one-count indictment charging the receipt and concealment of stolen securities moving in interstate commerce in violation of 18 U.S.C. 2315 (R. I, 1-2, 43). On October 1, 1965, petitioner was sentenced to imprisonment for three years (R. I, 48). The conviction was affirmed on appeal (R. I, 53; R. IV, 14).

Evidence adduced at the hearing on a pre-trial motion to suppress evidence (which was overruled) (R. I, 11, 33) and at the trial may be summarized as follows:

1. Between May 2 and May 4, 1964, a burglary occurred at the Fairview State Banking Company, Fairview, Illinois. Some stock certificates and a number of United States Series "E" Savings Bonds hav-

ing a face value of $72,750 were taken from 19 safety deposit boxes (R. III, 10-16, 23-31, 76).[1]

On September 18, 1964, the F.B.I. office at St. Louis, Missouri received information from a confidential source that petitioner was offering stolen securities for sale (R. II, 8-9). The agents ascertained where petitioner lived, the kind of automobile he drove, that his house was up for sale, and that he was an ex-bookmaker (R. II, 9). During the next ten days the F.B.I. received further information (from the same source) that the securities which petitioner was attempting to sell had been stolen from the burglarized Illinois bank (R. II, 9, 32-33). During the afternoon of September 28, petitioner was seen in the presence of another person in a St. Louis restaurant (R. II, 5-6, 11, 36). On that evening the confidential informant, who had proved reliable in the past, told the F.B.I. that petitioner had indicated that the man from whom he accepted the stolen securities was close by in St. Louis (R. II, 34-35, 37, 56).

In the afternoon of September 29, 1964 the informant advised agent Smith that petitioner would probably try to dispose of the stolen securities at the airport that evening and would be carrying them in a briefcase (R. II, 14, 31-32). At 7:00 p.m., about nine agents were stationed at various points inside and outside the St. Louis airport terminal building (R. II, 16-18). At about 9:30 p.m., petitioner was observed entering the airport lobby carrying a tan

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[1] "R. III" contains the testimony at the trial; "R. II," the testimony on the motion to suppress.

leather briefcase (R. II, 19; R. III, 32-33, 71-72). After sitting in a lounge chair in the lobby for about five minutes petitioner went to the stairway, descended to a lower level, and walked toward the East Concourse (R. I, 19-20). Agent Smith tapped petitioner on the shoulder, identified himself as an F.B.I. agent, and asked petitioner for identification. Petitioner said, "I'm Irv Lee" and produced identification (R. II, 20; R. III, 43). When asked what he had in the briefcase petitioner replied that he did not know (R. III, 43-44). At this point agent Smith placed petitioner under arrest (R. II, 21-23; R. III, 36; but cf. R. III, 47-48, 56).[2] Smith then handed the unlocked briefcase to agent Morley, who briefly glanced at its contents and saw some government savings bonds (R. II, 23, 50; R. III, 51-52). Thereafter the agents took petitioner to the first aid room in the airport building, where he was again informed that he was under arrest (R. II, 23-24; R. III, 38, 53). The briefcase was again opened and more carefully examined, and was found to contain a number of savings bonds and securities which had been in the Fairview bank prior to the burglary (R. II, 24-26; R. III, 23-31, 53-54, 74-76). In a search of petitioner's person the agents found a key to the briefcase, a brown paper bag, and a white envelope on which was written "F 71", "R 849", "at", "gate", and "Lee" (R. II, 27-28; R. III, 60-62). All of these exhibits were admitted in evidence over petitioner's objection (R. III, 38-39, 63, 76-77).

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[2] See the discussion in note 4, *infra*.

Evidence was also introduced that Trans World Airlines Flight 71, which originated in New York, was scheduled to arrive at St. Louis on September 29, 1964 at 8:49 p.m., at Gate 29, which is located on the East Concourse. That evening, however, the flight did not arrive until 9:58 p.m.; at 10:35 p.m. it departed on the next leg of its flight, for Tulsa, Oklahoma (R. III, 82-84).

2. As part of its final charge the court instructed (R. III, 125):

> Possession of property recently stolen, if not satisfactorily explained, is a circumstance from which the jury may reasonably draw the inference and find in the light of surrounding circumstances that the person in possession knew the property had been stolen. * * *
>
> If you find from the evidence beyond a reasonable doubt that the goods described in the indictment were stolen, and that, while recently stolen, the property was in the possession of the accused, the jury would be justified in drawing from those facts the inference that the goods were possessed by the accused with knowledge that the property was stolen, unless possession by the accused of the recently-stolen property is explained to the satisfaction of the jury by other facts and circumstances in evidence.

Petitioner objected to this charge on the grounds that an improper burden of proof in explaining possession had been shifted from the prosecution to him, and that the court's use of the phrase "to the satisfaction of the jury" was erroneous (R. III, 131-132).

The court also charged (R. III, 122):

> There is no obligation upon the defendant to prove his innocence. The burden of proving the guilt of the defendant rests upon the prosecution. That burden never shifts, and that burden cannot be sustained, unless and until the proof offered by the prosecution in the case convinces you beyond a reasonable doubt of the guilt of the defendant.

And, immediately after giving that part of the charge objected to by petitioner (set out *supra*, p. 5), the court further charged (R. III, 126):

> It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence warrant any inference which the law permits the jury to draw from possession of recently-stolen property. If any possession which the accused may have had of recently-stolen property is consistent with innocence, then the jury should acquit the accused.

Furthermore, the court also charged the jury that, even if it found from the evidence that the government has sufficiently proved all the other elements of the crime alleged, "nevertheless unless you further find and believe from the evidence that at the time the defendant received and concealed said securities, he had knowledge that said securities had previously been stolen, you must find the defendant not guilty" (R. III, 126).

ARGUMENT

1. Under 18 U.S.C. 3052, F.B.I. agents may make "* * * arrests without warrant for any offense

against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony." The information received from a confidential informant of previous reliability, whose information as to petitioner's actions was corroborated by the agents' observations (particularly their observation of petitioner at the airport carrying a briefcase when he was suspected of possessing stolen securities), was sufficient to constitute probable cause for the arrest. *Draper* v. *United States*, 358 U.S. 307. Petitioner argues that the agents had sufficient time to obtain a warrant before making the arrest. However, the definitive corroboration of the information given came only just prior to the time of arrest, when petitioner was seen at the airport carrying a briefcase whose contents might well have been the stolen securities. Prior to that time it is at least questionable whether the agents had sufficient information to show probable cause in order to obtain a warrant; not until he arrived at the airport carrying a briefcase had petitioner been observed in the possession of anything which might possibly have contained the stolen securities.

The search of the briefcase was thus incidental to the lawful arrest of petitioner.[3] It is not significant

[3] Petitioner was arrested in a public place, and the related search was of petitioner's person, was for the purpose of finding fruits of the suspected crime, and was conducted in a quiet and inoffensive manner. No entering of petitioner's home to conduct a search or make an arrest was involved,

whether petitioner was formally arrested before or after the initial brief glance at the briefcase, since the whole transaction occurred "in a matter of seconds" (R. III, 48) and was part of one process of arrest.[4] See *United States* v. *Devenere*, 332 F. 2d 160,

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and the arresting officers had probable cause to believe a felony was being committed in their presence. See *United States* v. *Rabinowitz*, 339 U.S. 56; *United States*, v. *Lefkowitz*, 285 U.S. 452, 465-466; see also *Preston* v. *United States*, 376 U.S. 364, 366-367; *Carroll* v. *United States*, 267 U.S. 132, 158.

[4] Petitioner asserts (Pet. 5-6, n. 2; 11-12) that the government has mistakenly maintained that agent Smith placed petitioner under arrest prior to taking the briefcase from him and looking inside it to determine its contents, and that the Eighth Circuit in its opinion (Pet. App. 25) also incorrectly assumed this to be so. A search without a warrant is proper only if incidental to a lawful arrest, and an arrest without a warrant cannot be justified as upon probable cause when it was preceded by a search which produced the evidence upon which the probable cause determination was grounded, petitioner argues. While petitioner's statements of law in these respects are substantially correct, his reliance on these doctrines is misplaced here. Although agent Smith did state on recross and redirect examination that he notified petitioner that he was under arrest after he and agent Morley looked into the briefcase and saw bonds there, and this was confirmed by agent Morley on cross-examination, the evidence as to just when petitioner was formally notified that he was under arrest is conflicting and the conclusions reached by the courts below in this regard are not without support. Not only were the apprehension, seizure, cursory inspection and arrest part and parcel of one simultaneous transaction, but the views of the agents as to when they placed petitioner under arrest are hardly determinative. As in *Henry* v. *United States*, 361 U.S. 98, 103, it is reasonable to conclude that the arrest actually took place when the agents stopped petitioner, and no formal notification to petitioner was required for the arrest to become complete. In *Henry, supra*, the Court stated, at

161 (C.A. 2); *United States* v. *Sorce*, 325 F. 2d 84, 86 (C.A. 7), certiorari denied, 376 U.S. 931.

2. The court's charge relating to possession of recently stolen property (set out *supra*, pp. 5-6) was in accord with established law. *E.g.*, *McIntosh* v. *United States*, 341 F. 2d 448, 456 (C.A. 8), certiorari denied, 381 U.S. 947; *Harding* v. *United States*, 337 F. 2d 254, 257 (C.A. 8); *Bray* v. *United States*, 306 F. 2d 743, 746-748 (C.A. D.C.); *Herman* v. *United States*, 289 F. 2d 362, 367 (C.A. 5), certiorari denied, 368 U.S. 897. See also *Rugendorf* v. *United States*, 376 U.S. 528, 536-537. The instruction did not require, but merely permitted, the drawing of legitimate inferences from established facts, and did not result in an improper shifting of the burden of proof.[5]

103: "When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete." The court below could well have so viewed the matter, although the question now sought to be raised by petitioner was not presented directly to the Eighth Circuit. And, apart from and prior to any inspection of the briefcase, the agents plainly had probable cause to arrest petitioner. Therefore, the related search was a valid one, since incidental to a lawful arrest.

[5] Nor was the instruction a backhanded way of commenting to the jury on petitioner's failure to testify, as asserted by petitioner. Rather, the court simply told the jury that the government could be regarded as having adequately carried its burden of proof on the knowledge question by showing unexplained possession, from which showing the jury could, but was not required to, infer that such possession was a knowing one. Petitioner attempts to convert the word "satisfactory" into a term of art (Pet. 17-21). The court could hardly have told the jury that it could draw an inference of knowl-

The court made it quite clear to the jury that the burden of proof remained on the prosecution throughout the trial and did not at any time shift to petitioner (R. III, 122).[6]

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edge from some, albeit unsatisfactory, explanation in the evidence. And the court made amply clear in its instruction that a satisfactory explanation of the possession need not come from the defendant at all, but could come from "other facts and circumstances in evidence." Indeed, there were such other facts in evidence here, since it was brought out on the cross and redirect examination of agent Smith that petitioner stated that he did not know what was in the briefcase, that he got it from someone he could not identify and whom he did not know, and that he was delivering the briefcase to some unknown man (R. III, 43-45). And petitioner's counsel made specific reference to this testimony in his closing argument (R. III, 104-105), in asserting that all the government had shown was naked possession and in arguing that petitioner's statements to agent Smith constituted "other evidence" which "fully explains" petitioner's possession of the stolen property. Standing alone, the challenged instruction was an adequate statement of the law and did not prejudice petitioner; in the context of the remainder of the court's charge (see *infra*, p. 6), it was clearly proper.

[6] The instructions held erroneous in *United States* v. *Lefkowitz*, 284 F. 2d 310, 313 (C.A. 2) and in *United States* v. *Allegrucci*, 258 F. 2d 70, 72, 73 (C.A. 3) expressly referred to the defense "*burden* of explaining their possession" (emphasis added).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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